Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KEVIN A. WHITECLIFF,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN R. ROSEN
440 Louisiana, Suite 2100
Houston TX 77002
Phone (713) 227-2900
Fax (713) 227-2922
SBN 17266200
Attorney for Petitioner

Alpha Law Brief Company • Houston, Texas • (713)981-9000 • (800)981-9001

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QUESTIONS PRESENTED

(1) Whether the standard of review on the quantum of evidence sufficient to warrant the submission of a defensive issue in the jury charge in a multi-defendant criminal case focuses on the individual defendant; or, conversely, on the knowledge and experiences of all the participants?

(2) Whether the enhanced-punishment provision of 18 U.S.C. §924(c)(1), *i.e.*, thirty (30) years for carrying a machinegun, is an element of the offense and a jury question which should be submitted in the charge; or a sentencing issue left to the discretion of the trial court?

(3) Whether 18 U.S.C. §924(c)(1), using or carrying a firearm during a crime of violence, requires a conviction for the crime of violence? And, conversely, whether an acquittal of the predicate crime of violence, by the same jury, precludes a conviction under §924(c)(1)?

PARTIES TO THE PROCEEDING

The parties in the proceeding in the Court of Appeals were the United States and the following individuals: Brad Eugene Branch, Kevin A. Whitecliff, Jaime Castillo, Renos Lenny Avraam, Paul Gordon Fatta, and Graeme Leonard Craddock. There are no parent companies or nonwholly owned subsidiaries to be listed.

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The opinion of the United States Court of Appeals for the Fifth Circuit has been published, *United States v. Branch et al.*, 91 F.3d 699 (5th Cir. 1996). It has been replicated in the Appendix attached to the joint petition for writ of certiorari filed on behalf of the co-appellants, Brad Eugene Branch, Graeme Leonard Craddock, and Renos Lenny Avraam. The September 25, 1996, order of the Fifth Circuit denying petitioner's petitions for rehearing and suggestion for rehearing *en banc* is also published, *United States v. Branch et al.*, 91 F.3d at 752. It is reproduced in the Appendix at A.

JURISDICTION

On August 2, 1996, the Court of Appeals for the Fifth Circuit affirmed the convictions on Counts 2 and 3, vacated the sentence in Count 3, and remanded Count 3 to the United States District Court for the Western District of Texas, Waco Division, for findings and resentencing. On September 25, 1996, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l).

STATUTORY PROVISIONS

18 U.S.C. §924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced-punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States,

uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below:

On August 6, 1993, a superseding indictment was returned which alleged that petitioner, Kevin A. Whitecliff: Count 1 - conspired to murder federal agents in violation of 18 U.S.C. §1117; Count 2 - aided and abetted the murder of federal agents in violation of 18 U.S.C. §§2, 1111(a), and 1114; and Count 3 - used or carried a firearm during the

offense alleged in Count 1, *i.e.*, conspiring to murder federal agents, in violation of 18 U.S.C. §924(c)(1). (11 R. at 312-20).[1]

To these counts of the indictment, Whitecliff entered a plea of not guilty before a jury. (11 R. at 325-26). The jury trial, encompassing appellant and ten (10) co-defendants, began on January 10, 1994. (1 Tr. at 14). The government rested on February 15. (26 Tr. at 6442). On February 17, the defense rested. (28 Tr. at 6872-73). The court charged the jury on Counts 1, 2, and 3. (15 R. at 1203-16, 1217-23, 1233-34). However, the court also charged the jury under Count 2 on self-defense and defense of another on the aiding and abetting murder allegation, (15 R. at 1224-29); and on the lesser included offense of aiding and abetting voluntary manslaughter, (15 R. at 1230-32); but refused appellant's request to charge the jury on the issue of self-defense and defense of another on the lesser included offense of aiding and abetting voluntary manslaughter. (29 Tr. at 7017).

On February 26, the jury returned verdicts of "not guilty" on Count 1 and the murder conspiracy allegation in Count 2, and verdicts of "guilty" on Count 3 and on the lesser included offense of aiding and abetting voluntary manslaughter. (15 R. at 1275-78; 32 Tr. at 7403-06).

By the judgment and sentence entered on June 21, and amended on June 23, 1994, Whitecliff was sentenced to consecutive terms of imprisonment for ten (10) years for aiding and abetting voluntary manslaughter and for thirty (30) years for using or carrying a firearm during the conspiracy to murder federal agents alleged in Count 1.

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[1]Petitioner will use the following abbreviations for references to volumes and page(s) of the appellate record: the record on appeal, "--R. at --"; and the transcript, "--Tr. at --".

Further, Whitecliff was assessed a $2,000.00 fine and restitution in the aggregate amount of $1,131,687.49. (17 R. at 1599-1604; App. B). By order dated June 20, restitution was limited to proceeds received by Whitecliff from any book or film contracts concerning the crimes for which he was convicted. (17 R. at 1572-73). Whitecliff filed a timely notice of appeal on June 24. (17 R. at 1605). The Fifth Circuit Court of Appeals acquired jurisdiction pursuant to 18 U.S.C. §3742 and 28 U.S.C. §1291.

On August 2, 1996, a 2-1 divided panel of the United States Court of Appeals for the Fifth Circuit issued majority and dissenting opinions and rendered a judgment affirming the convictions under Counts 2 and 3, vacating the sentence on Count 3, and remanding this cause to the trial court for findings and resentencing on Count 3. *United States v. Branch et al.*, 91 F.3d at 699-752.

On September 25, 1996, the Court of Appeals issued an order denying petitioner's petition for rehearing and suggestion for rehearing *en banc*. *United States v. Branch et al.*, 91 F.3d at 752.

This petition for writ of certiorari has been filed with the Clerk of the Court within ninety (90) days of the denial of rehearing in the Fifth Circuit, pursuant to Rule 13.3.

(ii) Statement of Facts:

This case arises out of the February 28, 1993, raid by 75 agents of the Bureau of Alcohol, Tobacco and Firearms (hereinafter ATF) upon the Mount Carmel Center of a religious sect, the name of which has come to be associated with this case: the Branch Davidians. This sect encompassed a multiethnic, multinational group of some 115 men, women

and children, whose ages ranged from toddlers to the geriatric. Their rural retreat and residence, located northeast of Waco, comprised principally of a rather large two-story building. The 65-year-old sect, originally affiliated with the Seventh Day Adventist Church, was committed to a life of Bible study, with an emphasis on the end of the world and the establishment of God's kingdom on earth. (16 Tr. at 4215). The group's leader, David Koresh, taught that, in the end, God's minions would be assaulted and persecuted by the forces of evil; and that, as a result, it was God's directive to arm themselves in order to defend themselves against the final attack. (16 Tr. at 4215).

During an almost year-long investigation prior to February 28, 1993, ATF agents developed information that David Koresh and his followers were amassing a stockpile of hundreds of weapons, including fully automated weapons and hand grenades, at their Mount Carmel center. ATF obtained warrants for the arrest of Koresh and for the search of the center. (6 Tr. at 1274; Government Exhibit Nos. 1906 and 2050). ATF agents planned a raid to execute these warrants on February 28.

Because of an article in a local newspaper and an inadvertent meeting with a television camera man, Koresh was forewarned of the impending raid. An undercover ATF agent, Rodriguez, who had been inside the center, advised ATF that, 45 minutes before the planned raid, Koresh and his followers were aware of the raid. However, ATF decided to carry out the raid as planned. (6 Tr. at 1274-1519; 7 Tr. at 1520-1824; 8 Tr. at 1825-2122; 9 Tr. at 2123-2297; 10 Tr. at 2298-2628; 11 Tr. at 2629-2921; 12 Tr. at 2922-3043, 3103-60).

The raid involved a frontal assault by ATF agents transported in two cattle trailers and a helicopter raid at the rear of the center. The frontal assault team was assigned a dual attack upon the front door and upon the window of the room ATF believed was the armory. As the agents erupted from the trailers, gunfire broke out in several locations throughout the center. The raid agents were ordered to ignore any gunfire, because it was anticipated that it would be necessary to shoot guard dogs in and around the center. In the rear of the center, Whitecliff fired upon the approaching U.S. Army combat helicopters, which had failed to coordinate their raid with the frontal assault units and arrived after the shooting had already begun. During this raid, 4 ATF agents and 3 Davidians were killed; and 22 agents and 4 Davidians were wounded.

Ultimately, the ATF agents retreated and a 51-day siege of the center began. On April 19, agents of the Federal Bureau of Investigation (hereinafter FBI) ordered tanks to enter and tear down the walls of the building and to fire tear gas canisters onto the 84 men, women and children still inside. At around noon, the building caught fire and 75 of the 84 occupants of the center died. A subsequent search of the center by Texas Rangers uncovered hundreds of firearms, whole and fragmented grenades, and other military equipment.

At trial, the government sought to prove that Whitecliff conspired with, and aided and abetted, the co-defendants to murder the ATF agents and used or carried a firearm in the course of the conspiracy to murder. Whitecliff defended these accusations on the basis of sudden passion and self-defense stemming from the ATF attack upon himself and the other Davidians.

The direct testimonial references to Whitecliff, his activities and his statements are scarce, in comparison to the size of the transcript:

ATF agent Rodriguez testified that, on his first meeting with David Koresh on February 17, Whitecliff stared at him. (13 Tr. at 3376-77). Outside the presence of the jury, Rodriguez testified that Whitecliff was in the chapel, on February 27 (the day before the ATF raid), when Koresh discussed a Waco newspaper article written about him and the likelihood that federal agents would come for him. (13 Tr. at 3387-88).

The raid plan called for ATF agents to be transported and disgorged from two cattle trailers at the front door of the Mount Carmel center, while three U.S. Army helicopters, manned by nine (9) ATF agents and assorted National Guard airmen, created a diversion by approaching, at an altitude of 500 feet, from the northeast quadrant of the center. The helicopters failed to coordinate with the frontal, ground assault, which had already erupted into massive gunfire all around the center when the helicopters came into visual range of the center, at about 500 meters from the center. At between 350 and 400 meters from the center, the pilots veered off to the north because of gunfire from the ground. It was later determined that the helicopters were struck, but no one was injured. (12 Tr. at 3154-3214; 13 Tr. at 3225-74, 3274-97). Though ATF weapons were purportedly holstered and the guardsmen unarmed, the helicopters were "combat-equipped aircraft," "used for combat," and painted in Army camouflage. (12 Tr. at 3205). Whitecliff reported to Kathryn Schroeder that, during the February 28 raid, he shot at the helicopters. (17 Tr. at 4515, 4629).

A female survivor of the center, Marjorie Thomas, (25 Tr. at 6190-92), by video deposition, (Government Exhibit Nos. 2213 and 2214), testified about seeing the approaching helicopters while gunfire was erupting around her and a bullet shattered a window near her. (Government Exhibit No. 2213 at 31). She also testified about overhearing a discussion among Whitecliff, co-defendant/appellant Branch and Oliver Gyarfas concerning shooting at unidentified targets. (Government Exhibit No. 2213 at 48-51).

Another female resident of the center, Victorine Wilma Leona Hollingsworth, (16Tr. at 4059-4247), saw Whitecliff, after February 28, keeping watch and sitting next to a gun which was not in his hands. (16 Tr. at 4109-11).

Kathryn Schroeder, (17 Tr. at 4432-4741), a female resident of the center and an original co-defendant, testified that, during the initial cease fire on February 28, she went downstairs to the kitchen. On the way, she was stopped by Whitecliff and asked to bring sodas to "the guys." (17 Tr. at 4468-69). Later, sometime during a twelve-day span after February 28, Schroeder saw Whitecliff, in the church, with an FN-FAL, .308 cal. firearm. (17 Tr. at 4501-04).

Whitecliff did not remain in the center throughout the 51-day siege. He surrendered himself voluntarily and peacefully during the early days. There is no evidence that Whitecliff fired a shot after the February 28 helicopter assault.

ARGUMENTS AMPLIFYING THE REASONS FOR REVIEW

I.

THE FIFTH CIRCUIT HAS MISAPPLIED *MATHEWS v. UNITED STATES*, 485 U.S. 58 (1988), IN ITS HOLDING THAT THE TRIAL COURT DID NOT ERR IN REFUSING AN INSTRUCTION ON SELF-DEFENSE IN THAT THE FIFTH CIRCUIT HAS ALTERED THE STANDARD OF REVIEW TO DISALLOW CONSIDERATION OF THE EVIDENCE RELEVANT TO AN INDIVIDUAL DEFENDANT IN FAVOR OF A CONSIDERATION OF ONLY EVIDENCE RELEVANT TO ALL THE PARTICIPANTS COLLECTIVELY AND TO INCREASE THE BURDEN OF PROOF UPON THE DEFENDANT/MOVANT TO A POINT BEYOND THAT MANDATED BY *MATHEWS v. UNITED STATES*.

This Court has long recognized the general proposition that an accused is entitled to an instruction as to any recognized defense for which there exists "evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). In its opinion, the Fifth Circuit Court of Appeals refused to consider such evidence because the record failed to demonstrate that the movant/defendant had personal knowledge of the evidence, impermissibly weighed and evaluated the credibility of the evidence in support of the defensive instruction, and failed to consider the evidence with regard to the individual appellant. *Branch v. United States*, 91 F.3d at 708-18. This alteration in the standard of appellate review is in conflict with the holding in *Mathews v. United States*.

Simply stated, the standard of appellate review has always been a determination of whether a trial court abused its discretion in refusing an instruction on an affirmative defense, such as self-defense; and an abuse is presumed "where the district court 'refuse[s] a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent,'..." *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir. 1993). In both the majority and dissenting opinions, the panel reviewed the history and distinctions of the various criteria the Fifth Circuit has used in making this determination. Whether defined as evidence "more than a mere scintilla" or "any evidence" or "evidence sufficient," the result is always the same: whether there is substantive evidence to support the submission of a factual issue to the jury. *See United States v. Lucien*, 61 F.3d 366, 374-77 (5th Cir. 1995); and *United States v. Jones*, 839 F.2d 1041, 1053 (5th Cir. 1988). Significantly, it is only the absence of such evidence which warrants a court's determination, that, as a matter of law, the trial evidence fails to raise a factual issue for a jury's determination. *United States v. Stovall*, 953 F.2d 188, 189 (5th Cir. 1992).

In the application of this standard of review to the facts of this case, it is apparent that there is no evidence that Whitecliff was the aggressor, *i.e.*, that he fired the first shot. He was in the rear of the center, away from the assault at the front, and fired only after gunfire had already broken out there. Therefore, he is not precluded, as a matter of law, from asserting self-defense. There is no evidence that he was aware of the approaching ATF agents, and was in no position to either see or hear them at that time. The only evidence is that he was in the rear of the center where he saw only the combat-equipped and camouflaged assault helicopters. There was evidence that shots were being fired from those aircraft.

The only other question is whether there was sufficient evidence to raise a reasonable doubt as to whether the ATF agents used excessive force. And to this extent, Whitecliff will point to the jury determination acquitting him of murder after a self-defense instruction. It is significant also that the trial court, who was in the best position to evaluate such evidence, gave such an instruction as to the murder charge.[2] There is the testimony of two individuals,who were inside the center, that, during the ATF assault, agents fired indiscriminately into windows and walls at points from which there was no gunfire. (17 Tr. at 4432-4741; Government Exhibit No. 2213 at 28-200).

The Fifth Circuit opinion addresses the factual contentions in terms of the "Davidians." Not once in the opinion was Whitecliff accorded consideration of his individual circumstances. It is never noted in this section of the opinion that Whitecliff was not at the front of the center at the time of the assault. However, the knowledge of those Davidians at the front door is attributed to defeat his individual claim to the instruction. Moreover, it imposes upon him the onerous burden of demonstrating, that, under abnormally confused and excited conditions, he was aware of evidence giving rise to the inferences that the ATF agents were shooting indiscriminately into areas from which there had been no fire. *Branch v. United States*, 91 F.3d at 708-18. Such a showing far exceeds the burden of production required for a determination of whether there is substantive evidence to support the submission of the issue of self-defense, based upon excessive force.

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[2]The issue in the trial court was not whether there was sufficient evidence to support the submission of self-defense on the lesser included offense of voluntary manslaughter, but whether the defendants were entitled to such an instruction at all.

In refusing to afford petitioner the benefit of inferences drawn from the testimony and experiences of others in the compound under the theory that petitioner failed to show that he had access to their knowledge, in refusing to entertain the evidence of a co-defendant as self-serving and incredible, and in failing to evaluate the evidence in support of the self-defense claim in light of petitioner's individual situation, the Fifth Circuit has altered the test established by this Court, and increased the burden of production well beyond the standard set in *Mathews v. United States*. The opinion of the Fifth Circuit conflicts with this Court's decision in *Mathews*. The petition for writ of certiorari should be granted.

II.

THE FIFTH CIRCUIT'S MISINTERPRETATION OF 18 U.S.C. §924(c)(1) AS MERELY A SENTENCING PROVISION, AND ITS REJECTION OF A JURY FINDING ON THE ISSUE OF WHETHER THE FIREARM USED WAS A MACHINEGUN, CONFLICT WITH OPINIONS FROM THE FIRST, SIXTH AND NINTH CIRCUITS.

Petitioner was sentenced to thirty (30) years for carrying a machinegun during a crime of violence under 18 U.S.C. §924(c)(1). The issue is whether the "machinegun" provision of §924(c)(1) constitutes an element of the offense or a sentencing provision. The Fifth Circuit deemed the question a matter of first impression. *Branch v. United States*, 91 F.3d at 738. If this conclusion is correct, the Fifth Circuit determination of the question constitutes a decision on an important question of federal law which has not been, but should be, settled by this Court. Petitioner asserts, however, that the conclusion is not correct and that the holding of the

Fifth Circuit conflicts with decisions in *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994); *United States v. Sims*, 975 F.2d 1225, 1231 (6th Cir. 1992), *cert. denied*, 507 U.S. 932, 113 S.Ct. 1315, 122 L.Ed.2d 702; *cert. denied*, 507 U.S. 998 and 999, 113 S.Ct. 1617 and 1620, 123 L.Ed.2d 177 and 179 (1993); *United States v. Martinez*, 7 F.3d 146 (9th Cir. 1993); and *United States v. Alerta*, 96 F.3d 1230 (9th Cir. 1996).

The indictment alleged, and the jury found, that petitioner was guilty of using or carrying a firearm in violation of 18 U.S.C. §924(c)(1). (11 R. at 312-20, 15 R. at 1275-78; 32 Tr. at 7403-06). The indictment did not allege, and the jury was not required to make any finding, that the firearm was a machinegun. However, the district court, in its Sentencing Findings and Opinion, (17 R. at 1574-92), ruled that the enhanced-weapon provision of §924(c)(1) is a sentencing provision and not a separate offense. (17 R. at 1574-87). The district court sentenced petitioner to thirty (30) years imprisonment for using a machinegun, (17 R. at 1599-1600,) rather than to the five (5) year sentence applicable to use of a firearm, as found by the jury in its verdict. *Branch v. United States*, 91 F.3d at 738. The Fifth Circuit held that the enhanced-weapon provision is a sentence-enhancement provision, which need not be addressed in the indictment or submitted to the jury in the charge. *Branch v. United States*, 91 F.3d at 738-40.

18 U.S.C. §924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States,

> uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

It is undisputed that, to convict a person of using or carrying a "firearm" under this provision, the indictment must so allege and the jury must so find. The second and third sentences of the subsection explicitly refer to a "conviction under this subsection" and to a "person convicted of a violation of this subsection," which can only mean that the fact finder has found each element of the offense beyond a reasonable doubt. *See generally Deal v. United States*, 113 S.Ct. 1993, 1996 (1993). Consideration of the subsection, as a whole, leads to the conclusion that the weapon, and its

characteristics, constitute an element of the offense. Therefore, a jury determination is required as to whether the weapon is a short-barreled rifle or shotgun, or a machinegun, or a destructive device, or whether it was equipped with a silencer or muffler.

In *United States v. Sims*, there were four §924(c)(1) counts (one machinegun and three other firearms). *United States v. Sims*, 975 F.2d 1225, 1231 (6th Cir. 1992), *cert. denied*, 507 U.S. 932, 113 S.Ct. 1315, 122 L.Ed.2d 702; *cert. denied*, 507 U.S. 998 and 999, 113 S.Ct. 1617 and 1620, 123 L.Ed.2d 177 and 179 (1993). The issue was whether the double jeopardy clause precludes multiple punishments where there is only a single, drug-related, predicate offense. *United States v. Sims*, 975 F.2d at 1233. The Sixth Circuit held that the double jeopardy clause required that the four counts be consolidated and opined that:

> This may be accomplished prior to trial by consolidating those counts into a single section 924(c) count and submitting special interrogatories or a special verdict form to the jury, requiring that if the jury returns a guilty verdict on the gun charge, it must specify which category or categories of weapons it unanimously has found the defendant was using or carrying. Or, it may be accomplished by submitting the separate gun counts to the jury and, should there be more than one conviction, merging those convictions after trial.

United States v. Sims, 975 F.2d at 1235. The Court ultimately concluded that, if the jury returned a finding as to both a firearm and a machine gun, the firearm finding would be merged into the machinegun finding. *United States v.*

Sims, 975 F.2d at 1235-36. In every respect, the Court determined that a specific jury finding as to the machinegun was required.

Subsequent to the decision in *United States v. Sims*, the Ninth Circuit noted in *United States v. Martinez*, 7 F.3d 146 (9th Cir. 1993):

> Where the defendant is charged for using different types of weapons under section 924(c)(1), the district court should either (1) submit separate counts under section 924(c)(1) to the jury, and, if there is more than one conviction, merge those convictions after trial, or (2) submit one section 924(c)(1) charge to the jury to specify which weapon or weapons the defendant used or carried.

United States v. Martinez, 7 F.3d at 148 n.1. Again, the issue was how to deal with multiple weapons on a single predicate offense and the Ninth Circuit approved the merger of the jury findings. *United States v. Martinez*, 7 F.3d at 147-49. Specifically adopting the *United States v. Sims* rationale, the Ninth Circuit approved the tenet that the type of weapon on a §924(c)(1) conviction is a question to be answered by the jury. *See United States v. Alerta*, 96 F.3d 1230, 1234-35 (9th Cir. 1996).

In *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994), the jury was not required to make a finding as to which of six firearms, including machineguns and handguns, the jury based its verdict of guilty. *United States v. Melvin*, 27 F.3d at 711. The government argued that there was an implicit finding of a machinegun and the district court found, on a preponderance of the evidence, that the weapon was a machinegun. However, because the jury had made no such finding, the district court imposed only the five (5) year

sentence. *United States v. Melvin*, 27 F.3d at 714. The government appealed on the claim that the record showed the use of a machinegun. *United States v. Melvin*, 27 F.3d at 712. On appeal, the First Circuit noted:

> The government acknowledges that a defendant found guilty of violating §924(c) may be sentenced to a thirty-year term only if the jury specifically identifies a machinegun or silencer as the firearm supporting the conviction.... It also is undisputed that the jury in this case mistakenly was not asked to specify the weapon or weapons underlying its verdict.

United States v. Melvin, 27 F.3d at 714. After reviewing the evidence, the First Circuit concluded "we may not exclude beyond a reasonable doubt the possibility that the jury rendered a guilty verdict ... based on a determination that the defendants possessed only a handgun." Moreover, the Court reasoned, the jury's verdict did not specifically find that defendants used "weapons subject to a term of imprisonment greater than five years." *United States v. Melvin*, 27 F.3d at 715. The First Circuit affirmed the decision of the district court.

With little in the way of elaboration, the majority opinion of the panel in the court below noted the opinion in *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993). In *United States v. Correa-Ventura*, the Fifth Circuit observed that the statute's reliance upon an underlying crime "contributes to the appearance that it is akin to a penalty enhancement provision." *United States v. Correa-Ventura*, 6 F.3d at 1083. Yet, the Court found that the similarity was not dispositive and that §924(c)(1) establishes a separate crime and recognized that "verdict specificity may be

required for some violations of 18 U.S.C. §924(c)." *United States v. Correa-Ventura*, 6 F.3d at 1087. The Court further noted:

> We do note (without deciding) that a different situation may be presented when the evidence tends to prove the use of more than one weapon, and the firearms proven fall within different classes of Section 924(c)'s proscribed weapons. For example, if a firearm violation is asserted, and evidence is introduced as to both shotguns and rifles (with a mandatory 5-year imprisonment penalty) and revolvers with silencing equipment (resulting in a 30-year imprisonment), the jury may well be required to agree on which type of weapon was used in order for the court to assess the appropriate penalty. In that instance, a unanimity instruction as to the class of weapon may be necessary, since the legislature, in amending Section 924(c) to provide varying penalties for certain classified firearms, appears to have indicated its intent that a unanimous verdict be reached with respect to the given class of firearms. *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992), *cert. denied*, 507 U.S. 932, 113 S.Ct. 1315, 122 L.Ed.2d 702 (1993).

United States v. Correa-Ventura, 6 F.3d at 1087 n.35.

Central to the rationale behind each of these opinions are the observations of this Court in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). That case involved the question of whether the due process clause is violated by a statutory provision mandating a specific sentence if the trial court finds, by a preponderance of the evidence, that an accused possessed a firearm, even though possession of the firearm was, by

statutory proviso, not an element of the criminal offense. *McMillan v. Pennsylvania*, 106 S.Ct. at 2414-16. In holding the Pennsylvania statute constitutional, this Court noted that, were the circumstances different, *i.e.*, had the firearm been critical to the jury deliberations or had the punishment been significantly increased, the due process clause would preclude reducing the state's burden of proof. *McMillan v. Pennsylvania*, 106 S.Ct. at 2416, 2419. More specifically, Justices Marshall and Stevens, in their dissents, were skeptical of any legislative attempt to dilute the burden on matters giving "rise to a special stigma and a special punishment." *McMillan v. Pennsylvania*, 106 S.Ct. at 2420, 2425.

These principles underlie the holding in *United States v. Alerta*, 96 F.3d 1230 (9th Cir. 1996). In that case, the Ninth Circuit reversed an enhanced-weapon conviction, under §924(c)(1), where the jury was not required to make a specific finding of whether the firearm was a pistol or a machinegun. *United States v. Alerta*, 96 F.3d 1234. The Court noted:

> Because of the immense consequences that follow a determination of whether a firearm used in violation of §924(c)(1) is an ordinary firearm or, at the other extreme, a machine gun, we have stated that a jury finding on that issue is required.

United States v. Alerta, 96 F.3d 1234-35. The Ninth Circuit reiterated its adherence to the rationale from *United States v. Martinez*. It also rejected the government's contention that the characteristics of the firearm did not constitute an element of the offense:

> The entire purpose of our requiring a special verdict or separate charges in *Martinez* was that the jury find

> beyond a reasonable doubt that the defendant used a machine gun. If the 30-year consecutive sentence is to be imposed under section 924(c)(1), the fully automatic character of the firearm must be found by the jury; that is to say, it is an element of the crime.

United States v. Alerta, 96 F.3d 1235. Again, the underlying rationale is in complete accord with the observations this Court made in *McMillan v. Pennsylvania*:

> Thus, for all we know, Alerta may have been sentenced to 30 years without a finding by the jury that he used or carried a machine gun. That we cannot permit, despite the very strong evidence that Alerta used or carried a machinegun. "[T]he question is not whether guilt may be spelt out in the record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials."

United States v. Alerta, 96 F.3d at 1236 [quoting *Carella v. California*, 491 U.S. 263 (1989) (Scalia, J., concurring)].

The gravamen of a §924(c)(1) offense is using or carrying a firearm. Unlike the situation in *McMillan v. Pennsylvania*, the weapon is an essential element of the offense. Its existence and characteristics are critical to the government's case. Petitioner can image no situation in which the government, in its case-in-chief, would not show that the firearm was a short-barreled rifle or shotgun, a machinegun, or that it constituted a destructive device or was equipped with a silencer or muffler. The statute provides also for a significant increase of twenty-five (25) years, if the firearm is a machinegun. The very fact that a machine gun, by definition, is a firearm makes the fact that the weapon is a machinegun a fact necessary to constitute the offense.

Therefore, the question whether the weapon was a machinegun is an essential element of the crime and subject to a jury determination on proof beyond a reasonable doubt. It is not merely a sentencing factor.

The conflicts between the Fifth Circuit opinion in this case and the opinions of the First, Sixth and Ninth Circuit opinions are apparent. The petition for writ of certiorari should be granted.

III.

THE FIFTH CIRCUIT HAS MISCONSTRUED 18 U.S.C. §924(c)(1) TO ELIMINATE ANY REQUIREMENT OF A CONVICTION PRECEDENT TO THE ASSESSMENT OF ITS ENHANCED-PUNISHMENT PROVISION, IN CLEAR ABROGATION OF THE PLAIN WORDS AND MEANING OF THE STATUTE.

In Count 1 of the indictment, Whitecliff was charged with the offense of conspiracy to commit the murder of federal agents. (11 R. at 312-19). In Count 3 of the indictment, Whitecliff was charged with using or carrying a firearm in the commission of the offense alleged in Count 1. (11 R. at 320). The jury returned a verdict of not guilty to Count 1 and a verdict of guilty to Count 3. (15 R. at 1275, 1278; 32 Tr. at 7403, 7405). On the appellate challenge to the absence of a conviction on the predicate offense, the Fifth Circuit held that none was required. *Branch v. United States*, 91 F.3d at 732-33. This holding constitutes a decision on an important question of federal law which has not been, but should be, decided by this Court.

18 U.S.C. §924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

The issue before the Court is whether §924(c)(1), by its plain and concise wording, mandates a conviction on the

predicate offense. Petitioner is not contending that he is entitled to an acquittal based upon the inconsistent jury verdict on the predicate offense alleged in Count 1 of the indictment. *United States v. Powell*, 469 U.S. 57 (1984).

18 U.S.C. §924(c)(1) criminalizes the use or carrying of a firearm "during and in relation to any crime of violence." It further provides that any sentence under the subsection is "in addition to the punishment provided for such crime of violence." Clearly, no punishment can be assessed for the predicate crime in the absence of a conviction. Moreover, the second sentence of the subsection mandates that any sentence be consecutive to all other sentences assessed, "including that imposed for the crime of violence." By its clear and concise wording, §924(c)(1) contemplates that there be a conviction on the predicate crime. Requiring that the firearm sentence begin only upon completion of the sentence for the predicate offense is consistent only with the intent that a conviction of the predicate crime be secured before a firearm conviction is warranted under §924(c)(1).

When Congress amended §924(c), under the Comprehensive Crime Control Act of 1984, it added the consecutive sentencing language to insure that there could be no concurrent sentencing with the predicate, or underlying, offense. S. Rep. No. 98-225, 98th Cong., 2d Sess. 312. The clear intent of the legislature was that there be a sentence on the predicate offense.

In the Fifth Circuit opinion, the challenge raised here was answered by citation to *United States v. Munoz-Fabela*, 896 F.2d 908 (5th Cir.), *cert. denied* 498 U.S. 824 (1990); and *United States v. Ruiz*, 986 F.2d 905 (5th Cir.), *cert. denied* 114 S.Ct. 154 (1993). Both are predicated upon the rationale that §924(c)(1) is a wholly separate offense and provides an independent basis for prosecution from the

predicate offense. Neither case, or any other found by petitioner, addresses the issue of whether a conviction on the predicate offense is mandated by the language of the statute itself.

Assuming, without conceding, that §924(c)(1) is nebulous with regard to the necessity of a conviction on the underlying, or predicate, offense, petitioner asserts that the rule of lenity will produce the same result. In the orderly review of statutory intent, the court looks first to the statutory text, legislative intent, and the policy considerations intrinsic to its enactment. *Moskal v. United States*, 111 S.Ct. 461, 465 (1990). If, at the conclusion of such a review, the court determines that the statute is subject to dual interpretations, the rule of lenity is invoked. That rule provides that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 92 S.Ct. 515, 523 (1971). If the rule of lenity is applied, §924(c)(1) would require a conviction on the predicate offense as a precondition to a successful prosecution of the firearm offense.

The text and legislative history of §924(c)(1) clearly indicate that Congress intended that an accused be convicted of the predicate offense as an element of the conviction for using or carrying a firearm during or in relation to that offense. The Fifth Circuit's rejection of the clear import of the statute constitutes a decision on an important question of federal law which has not been, but should be, settled by this Court. The petition for writ of certiorari should be granted.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

STEVEN R. ROSEN
440 Louisiana, Suite 2100
Houston TX 77002
Phone (713) 227-2900
Fax (713) 227-2922
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50437

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
BRAD EUGENE BRANCH, ET AL.,
Defendant-Appellant.

Appeal from the United States
District Court for the
Western District of Texas

(Opinion *United States v. Branch*, 5 Cir., 1996, 91 F.3d 699)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and SCHWARZER*, District Judge.

PER CURIAM:

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* District Judge of the Northern District of California, sitting by designation.

We find that *United States v. Lucien*, 61 F.3d 366 (5th Cir. 1995), does not control in this case. *Lucien* presented a factually different situation where instructional error in a predicate offense infected the conviction under 18 U.S.C. § 924(c)(1). The jury charge in *Lucien* failed to allow the jury to consider the lesser offense of possession, resulting in reversal of the predicate court. If in *Lucien* the found predicate offense had been possession of drugs as distinguished from distribution, the jury's view of the use of firearms found on the premises might have been quite different. Moreover, in *Lucien*, the government did not contest the reversal of the § 924(c)(1) conviction on the grounds that inconsistent verdicts may stand and therefore effectively conceded that point. We decline to interpret *Lucien* as changing the universally held view that inconsistent verdicts may stand. *United States v. Powell*, 469 U.S. 57 (1984). The remaining contentions are also without merit and are rejected. Judge Schwarzer adheres to his dissent.

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this court having requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

APPENDIX B

AO 245 S (Rev. 4/92)(W.D.Tx.rev.) Sheet 1 - Judgment in a Criminal Case

---

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

KEVIN A. WHITECLIFF,
Defendant.

AMENDED
Case Number
W-93-CR-046(3)

USAO Number
9301274

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, KEVIN A. WHITECLIFF, was represented by STEVEN ROCKET ROSEN.

The defendant has been found not guilty on Court SSS1 and is discharged as to such count.

The defendant was found guilty on Counts SSS2 and SSS3 by a jury verdict on February 26, 1994, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense
18:1112(a) and 18:2	Aiding and Abetting the Voluntary Manslaughter of Federal Officers

Date of Offense	Count Number(s)
02/28/93	SSS2
Title & Section	**Nature of Offense**
18:924(c)(1)	Possession of a Firearm During the Commission of a Crime of Violence
Date of Offense	**Count Number(s)**
02/28/93	SSS3

As pronounced on June 17, 1994, the defendant is sentenced as provided in Pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 for Counts SSS2 and SSS3, which shall be due immediately. Said Special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 23rd day of June, 1994.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Defendant's SSAN: 576-88-3930
Defendant's Date of Birth: 06/23/61
Defendant's address: 728 Palani Avenue
Honolulu, HI 96816

A true copy of the original, I certify,
WILLIAM G. PUTNICKI
Clerk, U.S. District Court
By: Mary Cunningham
Deputy

AO 245 S(Rev.4/92(W.D.TX.rev) Sheet 2 - Imprisonment

Defendant: KEVIN A. WHITECLIFF
Case Number: W-93-CR-046(3)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY (120) MONTHS as to Count SSS2 and THIRTY (30) YEARS as to Count SSS3, the term imposed as to Court SSS3 to be served CONSECUTIVELY to the term imposed as to Court SSS2.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

AO 245 S(Rev. 10/90)(W.D.TX.rev.) Sheet 3- Supervised Release

Defendant: KEVIN A. WHITECLIFF
Case Number: W-93-CR-046(3)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS as to Court SSS2 and FIVE (5) YEARS as to Court SSS3, such terms of supervised release to be served CONCURRENTLY with each other.

While on supervised release, the defendant shall not commit another Federal, State, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this Court (set forth below); and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X If this judgment imposes a fine, special assessment, costs, or restitution obligation, the defendant shall pay any such fine, assessments, costs and restitution that remain unpaid at the commencement of the term of supervised release.

_X_ The defendant shall not own or possess a firearm or destructive device.

_X_ The defendant shall provide the probation officer with access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the Court or probation officer.

2) The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) The defendant shall not use or possess methadone for treatment purposes, or in any other manner, shape or form, without express authority of the Court.

AO 245 S (Rev. 4/91)(W.D.Tx.rev) Sheet 5 - Fine

FINE

The defendant shall pay a fine of $2,000.00. This fine includes any costs of incarceration and supervision.

This amount is the total of the fines imposed on individual counts, as follows: $1,000.00 as to Count SSS2 and $1,000.00 as to Court SSS3.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid immediately. Any fine assessment and/or restitution that remain unpaid shall be paid during the term of supervised release at the direction of the United States Probation Officer.

If the fine is not paid, the Court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

AO 245 S (Rev. 4/91)(W.D.Tx rev.) Sheet 6 - Restitution and Forfeiture

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Alcohol, Tobacco, and Firearms Attn: David Effley, Ray Shirley, and Jane McHam 525 Griffin Street, Room 100 Dallas, TX 75202	$ 637,607.49
United States Department of Justice Office of Justice Programs Re: Public Safety Officers Benefit Program 633 Indian Avenue Northwest Washington, DC 20531	$ 494,080.00

Correspondence to the Department of Justice should reference the following case numbers:

PSOB, Case Number 93-101 - Conway Charles LeBleu,
PSOB, Case Number 93-102 - Robert J. Williams,
PSOB, Case Number 93-103 - Todd W. McKeehan, and
PSOB, Case Number 93-104 - Steven D. Willis.

Payments of restitution are to be made to the United States Attorney for transfer to the payees.

Restitution shall be paid in full immediately.

Any payment shall be divided proportionately between the payees.

AO 245 S.(Rev. 4/91)(W.D.Tx.rev.) Sheet 7 - Statement of Reasons

Defendant: KEVIN A. WHITECLIFF
Case Number: W-93-CR-046(3)

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report except the Court determined the defendant's actions constituted obstruction of justice, and two points were added to the offense level.

Guideline Range Determined by the Court:

Total Offense Lever:	30
Criminal History Category:	1
Imprisonment Range:	97 months to 120 months
Supervised Release Range:	2 to 3 years
Fine Range:	$15,000.00 to $150,000.00
Restitution:	$1,131,687.49

The fine is below the guideline range because of the defendant's inability to pay and amount of restitution.

The sentence is within the guideline range, that range does not exceed 25 months, and the Court finds no reason to depart from the sentence called for by application of the guidelines.

Supreme Court, U.S.
FILED
MAR 21 1997
CLERK

Nos. 96-989, 96-1028, 96-7227 and 96-7265

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAIME CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

KEVIN A. WHITECLIFF, PETITIONER

v.

UNITED STATES OF AMERICA

BRAD EUGENE BRANCH, RENOS LENNY AVRAAM, AND GRAEME LEONARD CRADDOCK, PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL GORDON FATTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

37 pp

QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed the convictions of petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1), even though the jury acquitted petitioners of the predicate crime of conspiring to murder federal officers.

2. Whether the type of firearm that is used or carried by an offender during and in relation to the predicate crime is a sentencing enhancement factor, rather than an element of the offense, under 18 U.S.C. 924(c)(1).

3. Whether petitioners' sentences under 18 U.S.C. 924(c)(1) may be enhanced based on their co-conspirators' use, during the predicate crime, of firearms requiring an enhanced sentence.

4. Whether petitioner Whitecliff was entitled to a jury instruction that self-defense or the defense of others was a defense to voluntary manslaughter.

5. Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, empowered Congress to enact 18 U.S.C. 922(*o*), which makes it a federal offense to transfer or possess a machinegun.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-989

JAIME CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 96-1028

KEVIN A. WHITECLIFF, PETITIONER

v.

UNITED STATES OF AMERICA

No. 96-7227

BRAD EUGENE BRANCH, RENOS LENNY AVRAAM, AND GRAEME LEONARD CRADDOCK, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 96-7265

PAUL GORDON FATTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-116a)[1] is reported at 91 F.3d 699. The opinion of the district court (Pet. App. 119a-141a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. A petition for rehearing was denied on September 25, 1996. Pet. App. 117a-118a. The petition for a writ of certiorari in No. 96-989 was filed on December 19, 1996; the petition in No. 96-1028 was filed on December 23, 1996; the petition in No. 96-7227 was filed on December 20, 1996; and the petition in No. 96-7265 was filed on December 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In August 1993, a grand jury sitting in the United States District Court for the Western District of Texas returned a superseding indictment charging petitioners and six co-defendants with conspiring to murder federal officers (Count 1), in violation of 18 U.S.C. 1117; and murdering federal officers (Count 2), in violation of 18 U.S.C. 1111 and 1114. All six petitioners, along with four co-defendants, were also charged with using and carrying a firearm during and in relation to a crime of violence (Count 3), in violation of 18 U.S.C. 924(c)(1). Petitioner Craddock was separately charged with possessing an unregistered destructive device (Count 7), in violation of 26 U.S.C. 5861(d); and with conspiring to do so (Count 8), in violation of 18 U.S.C. 371. Petitioner Fatta was separately charged with conspiring to possess machineguns (Count 9), in violation of 18 U.S.C. 371; and with possessing machineguns (Count 10), in violation of 18 U.S.C. 922(o). Pet. App. 4a-5a.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 96-989.

Following a jury trial, petitioners Castillo, Whitecliff, Branch, and Avraam were convicted on Count 2 of the lesser-included offense of voluntary manslaughter of federal officers, in violation of 18 U.S.C. 1112 and 1114. In addition, petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock were each convicted on Count 3 of using and carrying a firearm during and in relation to a crime of violence. Petitioner Craddock was also convicted on Count 7 of possessing an unregistered destructive device. Petitioner Fatta was convicted on Counts 9 and 10 of conspiring to possess machineguns and possessing machineguns. Pet. App. 5a-6a.

Petitioners Castillo, Whitecliff, Branch, and Avraam were each sentenced to 40 years' imprisonment, to be followed by five years of supervised release. Castillo, Whitecliff, and Branch were fined $2,000; Avraam was fined $10,000. Petitioner Craddock was sentenced to 20 years' imprisonment, to be followed by five years of supervised release, and fined $2,000. Petitioner Fatta was sentenced to 15 years' imprisonment, to be followed by three years of supervised release, and fined $50,000. In addition, petitioners were ordered to pay restitution of $637,607.49 to the Bureau of Alcohol, Tobacco, and Firearms, and $494,080 to the Public Safety Officers Benefit Program of the U.S. Department of Justice. Pet. App. 78a, 142a-151a; 96-1028 Pet. App. 3a-14a; 96-7227 Pet. App. 144a-173a; 96-7265 Pet. App. 123a-128a.

The court of appeals affirmed petitioners' convictions on all counts, vacated petitioners' sentences on Count 3 and remanded for resentencing, and affirmed petitioners' sentences on the other counts. Pet. App. 1a-116a.

1. On February 28, 1993, 76 agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) attempted to execute an arrest warrant for Vernon Wayne Howell and a search warrant for a large compound known as Mount Carmel outside Waco, Texas. Howell, who had changed his name to David Koresh, was the leader of the Branch Davidians, a religious sect that resided at the compound.

Koresh taught at daily Bible studies that the Branch Davidians would be "translated" into heaven following an apocalyptic confrontation between the Branch Davidians and outsiders, whom he referred to as "the beast" and "the enemies." Koresh instructed the Branch Davidians to prepare for the final battle and preached that, "if you can't kill for God, you can't die for God." In anticipation of an imminent violent confrontation with the outsiders, Koresh and the Branch Davidians had stockpiled weapons and ammunition. Pet. App. 2a-3a; Gov't C.A. Br. 4-10.

Approximately 45 minutes before the ATF agents arrived on February 28, 1993, undercover ATF Agent Roberto Rodriguez, who was posing as a possible convert, visited Koresh inside the Branch Davidian compound. During their conversation, Koresh was informed that he had a telephone call and left the room. When Koresh returned, he was shaking and shivering. Koresh told Rodriguez: "[N]either the ATF or National Guard will ever get me. They got me once, they'll never get me again." Koresh then looked out the front windows and repeated: "They're coming, Robert. The time has come." After Rodriguez left the compound, Koresh and other Branch Davidians prepared for a raid. Several men changed into black clothing and retrieved their weapons. The women were told to go to the chapel, but none of the men were there. Koresh came into the chapel wearing a black magazine vest and carrying an AK-47 assault rifle, and he told the women to go back to their rooms and watch. Pet. App. 3a, 16a-17a, 66a-67a; Gov't C.A. Br. 10-15.

Around 9:30 a.m., the ATF agents arrived at the Branch Davidian compound in two cattle trailers that were covered with tarp. After several agents stepped out of one of the trailers and approached the double front doors at the compound's entrance, gunfire erupted from behind the doors and from the windows along the front of the compound. The gunfire continued as the agents exited the two trailers and tried to approach the compound. During that period, three helicopters attempted to create a visual di-

version by flying towards the back of the compound. When the helicopters approached the compound, all three were hit by gunfire. The helicopters immediately left the area. Pet. App. 3a-4a; Gov't C.A. Br. 15-28.

When the gunshots erupted from the compound, the ATF agents at the front of the compound returned fire. Meanwhile, another group of agents proceeded down the right side of the compound. As two teams of agents climbed ladders onto the roof, they heard gunfire cracking around their heads. The first team attempted to enter the window that the agents believed led to Koresh's living quarters, but gunfire erupted through the window and the surrounding wall. Three agents from the second team entered a second window that they believed led to the room where Koresh stored his weapons and ammunition. When gunfire erupted from around the doorway and the opposite wall in the room, the agents returned fire and then escaped back through the window. Gov't C.A. Br. 33-38.

The gun battle between the ATF agents and the Branch Davidians lasted nearly two hours. During the battle, Agents Steven Willis, Conway LeBleu, Todd McKeehan, and Robert Williams were killed by gunfire from the compound. Pet. App. 4a; Gov't C.A. Br. 28-30, 34-35, 38, 40.

After a cease-fire was negotiated, Koresh and the Branch Davidians refused to leave the compound. Agents of the Federal Bureau of Investigation (FBI) then surrounded the compound and began negotiations with Koresh. Koresh instructed the Branch Davidians to open fire if the FBI agents attempted to enter the compound. Following a 51-day stand-off, the FBI attempted to induce Koresh and the remaining Branch Davidians to leave the compound by injecting tear gas on the morning of April 19, 1993. Around noon, Koresh and some of his followers ignited fires that set the compound ablaze. Although a few Branch Davidians escaped, nearly all of the Branch Davidians remaining in the compound died as a result of the fire or fatal gunshot wounds. Pet. App. 4a, 68a-69a; Gov't C.A. Br. 42-55.

2. The evidence at trial showed that petitioner Castillo retrieved his AR-15 assault rifle and joined Koresh and several other Branch Davidians at the front doors of the compound when the ATF agents arrived on February 28, 1993. After the gun battle began, Castillo tried to chamber a round in his rifle, but it jammed. He then retrieved a pistol from his room and went down the hall to another room on the first floor. Marjorie Thomas, a Branch Davidian who testified for the government at trial, saw Castillo with a gun at the end of the corridor on the second floor for a brief period of time. After the cease-fire was declared, Castillo retrieved an AK-47 assault rifle from the kitchen and stood guard at the kitchen door. When ATF Agents Kenneth Chisholm and Bernadette Griffin went into the interior courtyard to rescue an ATF agent who had fallen off the roof, Castillo briefly pointed his rifle at Agent Griffin. During the stand-off, Castillo stood guard with an AK-47 assault rifle in his room on the first floor. Pet. App. 59a-61a, 67a, 69a, 71a-72a; Gov't C.A. Br. 15, 44-46, 65-66. Castillo escaped from the compound during the fire on April 19, 1993. Texas Rangers later found a hand grenade in the assault vest that Castillo had taken off after he came out of the burning building. Gov't C.A. Br. 51-52, 125.

The evidence at trial showed that petitioner Whitecliff shot at the helicopters during the gun battle on February 28, 1993. During the stand-off, Whitecliff stood guard in the chapel with Thomas and petitioner Branch; he was armed with an FN-FAL .308 caliber rifle. Thomas overheard Whitecliff tell Branch, Castillo, and another resident that he had shot an agent during the gun battle. Pet. App. 61a-62a, 67a, 69a, 71a; Gov't C.A. Br. 40-41, 44-45, 64. Whitecliff left the compound during the stand-off on March 19, 1993. Gov't C.A. Br. 46.

The evidence at trial showed that petitioner Branch shot a rifle at the ATF agents from rooms on the second floor of the compound during the gun battle on February 28, 1993. Victorine Hollingsworth, a second Branch

Davidian who testified for the government at trial, heard Branch exclaim during the gun battle that "He nearly got me and I got one." Kathryn Schroeder, a third Branch Davidian who testified for the government at trial, heard Branch running around and yelling in the hallway on the first floor during the gun battle. During the stand-off, Branch stood guard in the chapel in the compound with Thomas and petitioner Whitecliff; he was armed with an M-1A .308 caliber rifle. Thomas overheard Branch tell Whitecliff, Castillo, and another resident that he had shot an agent during the gun battle. Pet. App. 58a-59a, 67a, 69a, 71a; Gov't C.A. Br. 31, 33, 40, 44-46, 63-64, 123-124. Branch left the compound during the stand-off on March 19, 1993. Gov't C.A. Br. 46.

The evidence at trial showed that petitioner Avraam fired a .50 caliber rifle at the ATF agents from the gymnasium on the right rear side of the compound during the gun battle on February 28, 1993. During the stand-off, Avraam stood guard in the areas above the gym and chapel; he was armed with a .50 caliber rifle. He escaped from the compound during the fire on April 19, 1993. After his arrest, Avraam told a fellow inmate that he had a fully automatic weapon while he was at the compound. Pet. App. 57a-58a, 67a, 69a, 72a; Gov't C.A. Br. 44-45, 51-52, 66, 124.

The evidence at trial showed that petitioner Craddock saw Koresh meeting with undercover ATF Agent Rodriguez on the morning of February 28, 1993, and he overheard Koresh saying, "They're coming, they're coming." Shortly afterwards, another Branch Davidian told Craddock that 75 ATF agents had arrived at the airport and that there might be a raid. Craddock returned to his room on the first floor, changed into his black clothing, and retrieved his AR-15 assault rifle. Craddock then went to the kitchen and loaded his 9 mm. handgun with ammunition, but Koresh told him to stay in his room. During the stand-off, Craddock stood guard in Schroeder's bedroom on the first floor; he carried an AR-15 assault rifle and wore a holster with his 9 mm. pistol. Craddock escaped from the

compound during the fire on April 19, 1993. He admitted to the Texas Rangers that Koresh had given him a hand grenade on the morning of the fire. After the fire, Texas Rangers found a live hand grenade in the cinder block building in which Craddock had taken refuge when he escaped from the compound. Pet. App. 68a, 69a; Gov't C.A. Br. 12-14, 44-45, 51, 53, 72, 125.

The evidence at trial showed that petitioner Fatta purchased semiautomatic firearms, magazines, ammunition, and other equipment for the Branch Davidians during the two years before the ATF raid. He also participated in the conversion of semiautomatic firearms into fully automatic firearms. Some of the gun parts, conversion kits, tools, and other equipment used to convert the firearms were shipped to the address of the Mag Bag, a garage located a short distance from the compound. In February 1992, Fatta obtained a Texas sales tax permit for the Mag Bag; on the application he listed himself as the owner and indicated that gun and firearm accessories were the primary product of the Mag Bag. After the fire on April 19, 1993, Texas Rangers found two firearms purchased by Fatta that had been converted to fully automatic firearms. They also found a package of Fatta's personal checks in the machine room in the compound where the Branch Davidians had converted firearms and manufactured hand grenades. Pet. App. 75a-76a; Gov't C.A. Br. 6-9, 55-56, 76-77. Fatta was at a gun show on February 28, 1993, when the ATF agents raided the compound. An arrest warrant was issued for Fatta in early March 1993, and Fatta became a fugitive. He surrendered to the Texas Rangers several weeks later in Houston, Texas. Gov't C.A. Br. 42.

3. Counts 9 and 10 of the indictment charged petitioner Fatta with conspiring to possess machineguns, in violation of 18 U.S.C. 371, and with possessing machineguns, in violation of 18 U.S.C. 922(*o*). Before trial, Fatta moved to dismiss Counts 9 and 10 on the ground that Congress had exceeded its power under the Commerce Clause in enacting 18 U.S.C. 922(*o*). The district court denied the

motion. Pet. App. 7a; 96-7265 Pet. App. 121a-122a. At trial, the jury found Fatta guilty on both counts. Pet. App. 6a; Tr. 7406-7407.

4. Count 2 of the indictment charged all six petitioners with murdering federal officers, in violation of 18 U.S.C. 1111 and 1114.[2] At trial, the district court charged the jury that one of the essential elements of that offense was that the defendant did not act in self-defense or defense of another. Pet. App. 8a; Jury Instructions 32.[3] The court then instructed the jury on the lesser-included offense of voluntary manslaughter under 18 U.S.C. 1112 and 1114. Jury Instructions 44-46. In setting forth the elements of that offense, the court did not instruct the jury that the government was required to prove beyond a reasonable doubt that a defendant did not act in self-defense or defense of another. *Id.* at 44. Petitioners objected to the omission of an instruction that the government was required to prove, as one of the elements of voluntary manslaughter, that a defendant did not act in self-defense or defense of another. Pet. App. 8a; Tr. 7017.[4] The jury found peti-

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[2] Section 1114 provides that whoever kills or attempts to kill designated officers and employees of the United States engaged in or on account of their official duties "shall be punished, in the case of murder, as provided under section 1111, or, in the case of manslaughter, as provided under section 1112." ATF agents are protected by Section 1114. See *United States* v. *Nabors*, 901 F.2d 1351, 1356-1357 (6th Cir.), cert. denied, 498 U.S. 871 (1990); *United States* v. *Alvarez*, 755 F.2d 830, 840-841 (11th Cir.), cert. denied, 474 U.S. 905 (1985), 482 U.S. 908 (1987).

[3] The district court's jury instructions were not fully transcribed as part of the trial transcript. Tr. 7043-7044, 7364-7366. The court's written jury instructions that were distributed and read to the jury were filed and made part of the record.

[4] At the jury charge conference, petitioners asked the district court to instruct the jury that self-defense is a defense to voluntary manslaughter, and the court responded that it would "give that some thought." Tr. 6950-6952, 7000-7001. After the court revised the jury charge, petitioners objected to the omission of a self-defense instruction with respect to the offense of voluntary manslaughter. The court did

tioners Castillo, Whitecliff, Branch, and Avraam guilty on Count 2 of the lesser-included offense of voluntary manslaughter. Pet. App. 6a; Tr. 7404-7405.

5. Count 1 of the indictment charged petitioners with conspiring to murder federal officers, in violation of 18 U.S.C. 1117. Count 3 charged each petitioner with using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). The predicate crime of violence alleged in Count 3 was the conspiracy to murder federal officers charged in Count 1. 96-7227 Pet. App. 176a. The court instructed the jury that an element of the Section 924(c)(1) offense was "[t]hat the Defendant under consideration committed the crime alleged in Count One of the Indictment." *Id.* at 177a. The jury was further instructed that "[t]he term 'firearm' means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." *Ibid.* The jury found petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock not guilty on Count 1 but guilty on Count 3. Pet. App. 6a; Tr. 7405-7406.

6. On June 16 and 17, 1994 the district court held a sentencing hearing. At the hearing, the court read into the record its written sentencing findings. Pet. App. 119a-141a; 6/16-17/94 Tr. 200-219. The court concluded that petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock, who were each convicted on Count 3 of using and carrying a firearm during and in relation to the conspiracy to murder federal officers charged in Count 1, were subject to enhanced 30-year sentences under 18 U.S.C. 924(c)(1).[5] Pet. App. 121a-134a. Relying on the "fortress

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not respond to the objection. Pet. App. 8a; Tr. 7017. The court read most of the jury charge, including the instructions on the elements of the offenses, to the jury before closing arguments, and no further objections were raised at that time. Tr. 7043-7044.

[5] Under Section 924(c)(1), a defendant convicted of using or carrying a firearm during and in relation to a crime of violence shall be sentenced to five years' imprisonment. Section 924(c)(1) further provides, however, that, "if the firearm is a machinegun, or a destructive device,

theory," the district court found that "[t]he evidence established the existence of not only a figurative but a literal fortress, manned by each of the [petitioners] convicted on this count." *Id.* at 123a-124a. Based on that evidence, the court concluded that "[e]ach [petitioner] either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993 and through the 51 day siege." *Id.* at 124a. Alternatively, the court concluded that each defendant could be held accountable for a co-conspirator's use of an enhanced weapon under the principles of *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Pet. App. 125a-127a. The court found it "clear that the use of fully automatic weapons, and probably grenades and silencers, was foreseeable and foreseen by all of the [petitioners], who were taught, who planned, and who practiced for just such an outcome." *Id.* at 127a.

The district court rejected petitioners' arguments that imposition of the enhanced 30-year sentence for using or carrying machineguns required a jury finding as to the type of firearm used or carried. Pet. App. 127a-134a.

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or is equipped with a firearm silencer or firearm muffler," the defendant shall be sentenced to 30 years' imprisonment.

The term "firearm" is defined to mean "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm." 18 U.S.C. 921(a)(3).

Section 921(a)(23) provides that "[t]he term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b))." 18 U.S.C. 921(a)(23). That Section defines "machinegun" to include "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."

The term "destructive device" is defined in 18 U.S.C. 921(a)(4). The terms "firearm silencer" and "firearm muffler" are defined in 18 U.S.C. 921(a)(24).

Based on "the plain language of the statute, and the Supreme Court's determination of the elements" of the offense in *Smith* v. *United States*, 508 U.S. 223, 227-228 (1993), the court concluded that "the type of weapon is not an element of the offense." Pet. App. 129a-130a.

Petitioners Castillo, Whitecliff, Branch, and Avraam were each sentenced to 30 years' imprisonment on Count 3, to run consecutively to their ten-year sentences on Count 2. Pet. App. 78a, 144a; 96-1028 Pet. App. 6a; 96-7227 Pet. App. 146a, 156a. The district court concluded that Craddock was also subject to a 30-year sentence on Count 3, but it "depart[ed] downward" from the sentence required by the statute and sentenced Craddock to ten years' imprisonment on Count 3, to run consecutively to his ten-year sentence on Count 7.[6] Pet. App. 78a; 96-7227 Pet. App. 166a; 6/16-17/94 Tr. 230-232.

7. The court of appeals affirmed petitioners' convictions on all counts, vacated petitioners' sentences on Count 3 and remanded for resentencing, and affirmed petitioners' sentences on the other counts. Pet. App. 1a-116a.

a. The court rejected petitioner Fatta's contention that his convictions on Counts 9 and 10 were invalid because Congress had exceeded its power under the Commerce Clause in enacting 18 U.S.C. 922(*o*). Pet. App. 7a. Noting that the issue was pending before the en banc court in *United States* v. *Kirk*, 70 F.3d 791 (1995), reh'g en banc granted, 78 F.3d 160 (5th Cir. 1996), the court observed that "[t]he en banc court's resolution of this issue will govern the ultimate validity of Fatta's convictions on Counts 9 and 10." Pet. App. 7a. The court upheld Fatta's convictions "[u]nder pre-*Kirk* caselaw now binding this panel," but decided to "hold the mandate pending decision in *Kirk*." *Ibid.*[7]

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[6] The government did not file a timely notice of appeal with respect to Craddock's sentence on Count 3.

[7] Subsequent to the court of appeals' decision in the instant cases, an equally divided en banc court in *Kirk* affirmed the judgment of the

b. The court of appeals rejected the contention of petitioners Castillo, Whitecliff, Branch, and Avraam that they were entitled to an instruction on self-defense and defense of another with respect to the lesser-included offense of voluntary manslaughter under Count 2. Pet. App. 8a-30a. It observed that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Id.* at 8a (quoting *Mathews* v. *United States*, 485 U.S. 58, 63 (1988)).

Applying that standard, the court "review[ed] the record cognizant that the 'merest scintilla of evidence' in the defendant's favor does not warrant a jury instruction regarding an affirmative defense for which the defendant bears the initial burden of production." Pet. App. 9a. It explained that "[a] district court cannot refuse to give an instruction for which there is sufficient evidence in the record for a reasonable juror to harbor a reasonable doubt that the defendant did not act in self defense, but the district court is not required 'to put the case to the jury on a basis that "essentially indulges and even encourages speculations."'" *Id.* at 10a (quoting *United States* v. *Collins*, 690 F.2d 431, 438 (5th Cir. 1982), cert. denied, 460 U.S. 1046 (1983)). The court also noted that the district court's decision to give a self-defense instruction with respect to the murder charge "seed[ed] no right to a similar plea of self-defense to voluntary manslaughter." *Id.* at 16a. To justify a self-defense instruction in this case, the court concluded, "[t]here must be sufficient evidence from which a reasonable juror might infer, at a minimum, either that 1) [petitioners] did not know the ATF agents' identity, or that 2) the ATF agents' use of force, viewed from the perspective of a reasonable officer at the scene, was objectively unreasonable under the circumstances." *Ibid.* (citation omitted).

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district court upholding the constitutionality of Section 922(*o*). See *United States* v. *Kirk*, 105 F.3d 997 (5th Cir. 1997).

The court of appeals held that "the evidence did not require the proposed self-defense instruction." Pet. App. 16a. "Viewing the record as a whole and in the light most favorable to [petitioners]," the court was "not persuaded that a reasonable juror could harbor a reasonable doubt that [petitioners] knew the approaching ATF agents' identity." *Id.* at 19a. The court found that "[t]he record also belies the contention that the ATF agents used excessive force." *Id.* at 20a. The court explained that "[t]he evidence does not permit any reasonable inference but that the Davidians fired the first shots that morning." *Ibid.* The court also pointed out that "evidence that the ATF fired first without evidence that such fire was indiscriminate or otherwise excessive [would] not warrant a self-defense instruction." *Id.* at 27a. It found "no evidence that any of the [petitioners] either came under indiscriminate, unprovoked fire or knew that such fire was taking place." *Id.* at 28a. The court rejected petitioners' claim that excessive force was inherent in the nature of the ATF raid, noting that "a citizen may not initiate a firefight solely on the ground that the police sent too many well-armed officers to arrest him." *Id.* at 29a-30a. The court accordingly concluded "that the district court did not err in refusing to instruct the jury on self-defense and the defense of another with regard to the voluntary manslaughter charge." *Id.* at 30a.

c. The court of appeals rejected the contention of petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock that their convictions on Count 3 for using and carrying a firearm during and in relation to a crime of violence were invalid because the jury had acquitted them on Count 1 of the predicate crime of conspiring to murder federal agents. Pet. App. 65a. The court explained that "[i]t is only the fact of the offense, and not a conviction, that is need[ed] to establish the required predicate." *Ibid.* (quoting *United States* v. *Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.), cert. denied, 498 U.S. 824 (1990)). The court acknowledged that petitioners' Section 924(c)(1) convictions

could not stand if there was insufficient evidence to support a jury finding that petitioners conspired to murder federal officers. *Id.* at 64a. The court concluded, however, that "[t]he record is replete with evidence of a conspiracy to murder federal agents and each individual [petitioner's] membership in that conspiracy." *Id.* at 65a.

d. The court of appeals rejected the contention of petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock that the district court had improperly imposed enhanced 30-year sentences under Section 924(c)(1) based on the use of machineguns by other members of the conspiracy. Pet. App. 78a-85a. The court observed that "[t]he validity of the district court's action turns upon whether § 924(c)(1)'s machinegun provision creates a separate, independent offense or is a sentence-enhancement provision." *Id.* at 80a. Based on the statute's structure and legislative history, the court ruled that "the machinegun clause of § 924(c)(1) is a sentence-enhancement provision." *Id.* at 81a. It therefore concluded that "[t]he Government need not charge in the indictment nor must the jury find as part of its verdict the particular type of firearm used or carried by the defendant." *Id.* at 85a.

The court of appeals nevertheless vacated petitioners' enhanced sentences on Count 3 and remanded for resentencing. Pet. App. 85a-86a. It observed that the district court had made no findings as to whether machineguns had been "actively employed" within the meaning of *Bailey* v. *United States*, 116 S. Ct. 501 (1995), which was decided during the pendency of petitioners' appeal. Pet. App. 86a. The court concluded that "[w]ith *Bailey* the district court must take another look and enter its findings regarding 'active employment.'" *Ibid.* The court explained that, "[s]hould the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence." *Ibid.* The court also noted that "the district court should consider whether [petitioners] actively employed [an enhanced]

weapon during and in relation to the conspiracy to murder federal agents." *Ibid.*[8]

District Judge Schwarzer, sitting by designation, dissented. Pet. App. 98a-116a. He concluded that the district court had abused its discretion in failing to give an instruction on self-defense and defense of another with respect to the lesser-included offense of voluntary manslaughter under Count 2. *Id.* at 98a-109a. District Judge Schwarzer also concluded that the convictions of petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock on Count 3 for using and carrying a firearm during and in relation to a crime of violence should be reversed because the evidence at trial was insufficient to show that those petitioners had committed the predicate crime of conspiring to murder federal agents. *Id.* at 114a-116a.[9]

8. The court of appeals denied petitioners' petition for rehearing and rejected their suggestion for rehearing en banc. The panel expressly rejected the claim that its decision upholding petitioners' convictions under Section 924(c)(1) on Count 3 despite their acquittals on Count 1 conflicted with *United States* v. *Lucien*, 61 F.3d 366 (5th Cir. 1995). Pet. App. 117a-118a. The panel concluded that

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[8] The court of appeals also rejected claims by petitioners that the district court had improperly accepted the jury's guilty verdict on Count 3 (Pet. App. 31a-38a); that the district court had abused its discretion in sua sponte empaneling an anonymous jury (*id.* at 38a-44a); that the district court had abused its discretion by admitting into evidence some of petitioner Castillo's post-arrest statements but excluding others (*id.* at 45a-56a); that the evidence was insufficient to sustain petitioners' convictions on each count (*id.* at 56a-78a); and that the district court had improperly calculated their sentences under the Sentencing Guidelines (*id.* at 86a-98a). Petitioners do not renew any of those claims here.

[9] District Judge Schwarzer also concluded that the district court had abused its discretion in excluding from evidence a portion of petitioner Castillo's post-arrest statement. Pet. App. 109a-114a. Castillo does not renew that claim here.

petitioners' "remaining contentions [were] also without merit." *Id.* at 118a.

ARGUMENT

1. Petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock contend (96-989 Pet. 24-25; 96-1028 Pet. 21-24; 96-7227 Pet. 5-12) that their convictions on Count 3 for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1) are invalid because the jury acquitted them of the predicate crime of violence charged in Count 1. That contention is without merit and does not warrant review by this Court.

a. The courts of appeals uniformly agree that a defendant need not be charged with or convicted of the predicate crime in order to be convicted under Section 924(c)(1) of using or carrying a firearm during and in relation to that predicate crime. See, *e.g.*, *United States* v. *Bracy*, 67 F.3d 1421, 1430 (9th Cir. 1995); *United States* v. *Anderson*, 59 F.3d 1323, 1326 (D.C. Cir.) (en banc), cert. denied, 116 S. Ct. 542 (1995); *United States* v. *Ospina*, 18 F.3d 1332, 1336 (6th Cir.), cert. denied, 512 U.S. 1226 (1994); *United States* v. *Thomas*, 12 F.3d 1350, 1362-1363 (5th Cir.), cert. denied, 511 U.S. 1095, 1114 (1994); *United States* v. *Frayer*, 9 F.3d 1367, 1372 (8th Cir. 1993), cert. denied, 115 S. Ct. 77 (1994); *United States* v. *Hill*, 971 F.2d 1461, 1464 (10th Cir. 1992) (en banc). Rather, "it is only the fact of the offense, and not a conviction, that is needed to establish the required predicate [crime under Section 924(c)(1)]." *United States* v. *Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.), cert. denied, 498 U.S. 824 (1990). That conclusion follows from the text of Section 924(c)(1).

Section 924(c)(1) makes it an offense when a person, "during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm." Thus, the language of the statute applies whenever a defendant "may be prosecuted" for covered predicate crimes; application of the statute is not limited to predicate crimes

for which the defendant has been convicted. See *United States* v. *Ospina*, 18 F.3d at 1335-1336.

As petitioners point out (96-989 Pet. 24; 96-1028 Pet. 23; 96-7227 Pet. 5), Section 924(c)(1) further provides that any punishment imposed thereunder "shall [be] in addition to the punishment provided for such crime of violence or drug trafficking crime," and that "the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." Contrary to petitioners' contention, however, neither of those sentencing provisions compels the conclusion that a defendant must be convicted of the predicate crime in order to be convicted under Section 924(c)(1). Rather, those provisions simply make clear that where a defendant *is* charged with and convicted of the predicate crime, his sentence under Section 924(c)(1) must run consecutively to the sentence imposed for the predicate offense. See *United States* v. *Gonzalez*, No. 95-1605 (Mar. 3, 1997), slip op. 8 ("[W]hen a defendant violates § 924(c), his sentencing enhancement under that statute must run consecutively to all other prison terms.").

b. The fact that petitioners were charged with and acquitted of the predicate offense does not alter the analysis. When a jury convicts a defendant under Section 924(c)(1) but acquits him of the predicate crime, the jury has simply returned inconsistent verdicts.[10] This Court made clear in *United States* v. *Powell*, 469 U.S. 57, 65

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[10] The jury in the instant case was instructed that it could convict petitioners on the Section 924(c)(1) charges only if it found that the government had proved beyond a reasonable doubt that petitioners had "committed the crime alleged in Count One of the Indictment." 96-7227 Pet. App. 177a.

(1984), that such inconsistency does not warrant reversal of an otherwise valid conviction:

> [I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise or lenity, arrived at an inconsistent conclusion on the lesser offense.

The Court further explained that "a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67. Thus, a defendant's conviction under Section 924(c)(1) is valid so long as the government presented sufficient evidence at trial to prove the predicate offense as an element of the Section 924(c)(1) violation, even when the defendant is acquitted of the predicate crime. See *United States* v. *Bracy*, 67 F.3d at 1430-1431; *United States* v. *Frayer*, 9 F.3d at 1372; *United States* v. *Ruiz*, 986 F.2d 905, 911 (5th Cir.), cert. denied, 510 U.S. 848 (1993); *United States* v. *Laing*, 889 F.2d 281, 288-289 (D.C. Cir. 1989), cert. denied, 494 U.S. 1008, 1069 (1990).

After reviewing the record in this case, the court of appeals ruled that the evidence was sufficient to support a finding that petitioners committed the predicate crime of conspiring to murder federal agents. Pet. App. 64a-70a. Petitioners do not directly challenge that ruling here.[11]

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[11] Petitioners assert (96-989 Pet. 25 n.13; 96-7227 Pet. 9-10) that the court of appeals' decision conflicts with *United States* v. *Lucien*, 61 F.3d 366 (5th Cir. 1995). In that case, the jury acquitted the defendant on one drug count, but convicted him on a second drug count and on a Section 924(c)(1) count. The court of appeals reversed the defendant's conviction on the second drug count because the district court had failed to give a lesser-included-offense instruction at trial. *Id.* at 373-377. The

Accordingly, they were properly convicted under Section 924(c)(1).

2. Petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock contend (96-989 Pet. 5-20, 25-30; 96-1028 Pet. 12-21; 96-7227 Pet. 13-26) that the type of firearm used or carried is an element of the Section 924(c)(1) offense that must be submitted to the jury rather than a sentencing enhancement factor that may be determined by the court. The court of appeals correctly rejected that contention. Although the court's decision conflicts with a decision of the Ninth Circuit, review by this Court is not warranted at the present time in light of the current interlocutory posture of the case.

a. In pertinent part, Section 924(c)(1) provides:

> Whoever, during and in relation to any crime of violence * * *, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence * * *, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

As this Court has observed, the statute requires the government to prove (1) "that the defendant 'use[d] or carrie[d] a firearm,'" and (2) "that the use or carrying was 'during or in relation to' a 'crime of violence or drug

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court then summarily concluded that the defendant's conviction on the Section 924(c)(1) count "cannot stand." *Id.* at 377. In denying the petitions for rehearing in this case, the court of appeals correctly distinguished *Lucien* on the ground that it "presented a factually different situation where instructional error in a predicate offense infected the conviction under 18 U.S.C. § 924(c)(1)." Pet. App. 117a-118a. In any event, even if the Fifth Circuit's decision in this case conflicted with its decision in *Lucien*, an intracircuit conflict would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

trafficking crime.'" *Smith* v. *United States*, 508 U.S. 223, 227-228 (1993). In light of the language and structure of the statute, the type of firearm used or carried is not an essential element of the offense; it is instead a factor that determines the length of the sentence. Cf. *Bailey* v. *United States*, 116 S. Ct. 501, 505 (1995) ("Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.'"); *Smith* v. *United States*, 508 U.S. at 227 ("Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.'").[12]

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[12] Petitioners' reliance (96-989 Pet. 9-10; 96-1028 Pet. 14) on *Deal* v. *United States*, 508 U.S. 129 (1993), is misplaced. The issue in *Deal* was whether multiple convictions under Section 924(c)(1) in a single proceeding triggered the enhanced sentences in the second sentence of Section 924(c)(1), which provides stiffer sentences "[i]n the case of [a] second or subsequent conviction." See 508 U.S. at 131. This Court concluded that the term "conviction" in that context "refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction." *Id.* at 132. Since the first sentence of Section 924(c)(1) makes no reference to a "conviction," this Court's ruling in *Deal* has no bearing on the issue in this case.

Nor is there merit in petitioner Castillo's claim (96-989 Pet. 25-28) that the court of appeals' decision violates his constitutional rights to be charged by indictment and to be tried by a jury. An indictment charging a violation of Section 924(c)(1) satisfies the Fifth Amendment when it alleges the essential elements of the offense, namely, that a defendant used or carried a firearm during and in relation to a crime of violence or a drug trafficking crime. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962). Treating the type of firearm used or carried as a sentencing enhancement factor does not deprive a defendant of his Sixth Amendment right to have the jury determine every essential element of the offense. See *McMillan* v. *Pennsylvania*, 477 U.S. 79, 93 (1986) ("[W]e need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

b. We acknowledge, however, that the court of appeals' decision in the instant case conflicts with a decision of the Ninth Circuit. That court has held that, "[i]f the 30-year consecutive sentence is to be imposed under section 924(c)(1), the fully automatic character of the firearm must be found by the jury; that is to say, it is an element of the crime." *United States* v. *Alerta*, 96 F.3d 1230, 1235 (1996). Other courts have also indicated that the jury must determine which type of firearm was used or carried under Section 924(c)(1). In *United States* v. *Melvin*, 27 F.3d 710, 714 (1994), the First Circuit noted with apparent approval the government's concession in that case "that a defendant found guilty of violating § 924(c) may be sentenced to a thirty-year term only if the jury specifically identifies a machine gun or silencer as the firearm supporting the conviction." The Sixth Circuit has also stated in dicta that imposition of the enhanced 10- and 30-year penalties under Section 924(c)(1) requires a jury finding as to the type of firearm used or carried. See *United States* v. *Sims*, 975 F.2d 1225, 1235-1236 (1992), cert. denied, 507 U.S. 832, 998, 999 (1993).

In light of the current interlocutory posture of the case, however, review by this Court is not warranted at the present time. The court of appeals vacated each petitioner's sentence under Section 924(c)(1) and remanded the case for further proceedings in the district court to determine whether members of the conspiracy actively employed machineguns. Pet. App. 86a, 98a. It thus remains to be seen whether petitioners will be sentenced under the machinegun provisions of Section 924(c)(1). After petitioners have been resentenced on Count 3, they will have a further opportunity to contest their sentences in the court of appeals and, if necessary, in this Court. Accordingly, review by this Court would be premature at the present time.

3. Petitioners Castillo, Branch, Avraam, and Craddock contend (96-989 Pet. 20-24; 96-7227 Pet. 27-30) that the district court erred in imposing enhanced 30-year sentences

under Section 924(c)(1) based on their co-conspirators' use of machineguns, firearms with silencers, and hand grenades during the conspiracy to murder federal agents. The court of appeals' resolution of that issue is correct and does not conflict with any decision of this Court or of another court of appeals. Because the court of appeals remanded for further findings and for resentencing, moreover, review by this Court would be premature at the present time.

In the circumstances of this case, the court of appeals correctly concluded that use of enhanced weapons by petitioners' co-conspirators would be a sufficient basis for imposition of enhanced 30-year sentences on Count 3. The predicate crime of violence charged in Count 3 was a conspiracy to murder federal officers, in violation of 18 U.S.C. 1114 and 1117. See 96-7227 Pet. App. 176a. By convicting petitioners on Count 3, the jury necessarily found that petitioners were members of a conspiracy to murder federal agents. Under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640, 645-648 (1946), a member of a conspiracy may be held responsible for the acts committed by a co-conspirator in furtherance of the conspiracy.[13] As the

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[13] The *Pinkerton* doctrine is usually applied under Section 924(c)(1) to permit a jury to find a defendant guilty of violating that provision based on a co-conspirator's use of a firearm. See, *e.g.*, *United States* v. *Myers*, 102 F.3d 227, 237-238 (6th Cir. 1996); *United States* v. *Dean*, 59 F.3d 1479, 1489-1490 (5th Cir. 1995), cert. denied, 116 S. Ct. 748, 794 (1996); *United States* v. *Williams*, 31 F.3d 522, 526 (7th Cir. 1994). In this case, independent evidence established that petitioners had themselves used firearms during the gun battle with the ATF agents on February 28, 1993. Pet. App. 71a-72a. The validity of petitioners' convictions is therefore not dependent on application of the *Pinkerton* doctrine. The question instead is whether the district court, in sentencing petitioners on the Section 924(c)(1) count, may hold petitioners accountable for the *types* of weapons used by other members of the conspiracy. Petitioners offer no reason why *Pinkerton* principles should not apply in that context. Cf. Sentencing Guidelines § 1B1.3(a)(1)(B) (defining conduct for which the defendant is held accountable at sentencing to include "in the case of a jointly undertaken criminal activity * * * all

court of appeals noted, "there is evidence from which it could be found that machineguns and other enhancing weapons were used by one or more members of the conspiracy in the firefight of February 28." Pet. App. 86a. The court of appeals therefore properly concluded that, "[s]hould the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence." *Ibid.*

Contrary to petitioner Castillo's claim (96-989 Pet. 20-24), the court of appeals' decision does not conflict with *Bailey* v. *United States*, 116 S. Ct. 501 (1995). At sentencing, the district court ruled that petitioners were subject to enhanced 30-year sentences on Count 3 for two reasons. Relying on the "fortress theory," the district court first concluded that "[e]ach [petitioner] either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993 and through the 51 day siege." Pet. App. 124a. Alternatively, the court concluded that each petitioner could be held accountable for a co-conspirator's use of an enhanced weapon under the *Pinkerton* doctrine. *Id.* at 125a-127a.

After petitioners were sentenced, this Court decided in *Bailey* that a conviction for using a firearm under Section 924(c)(1) "requires evidence sufficient to show an *active employment* of the firearm by the defendant." 116 S. Ct. at 505.[14] As the court of appeals correctly observed, the district court's finding "that each [petitioner] had actual or constructive possession of an enhanced weapon" was insufficient under *Bailey* to establish that petitioners had "used" an enhanced weapon. Pet. App. 86a. The propriety of petitioners' sentences under *Pinkerton* principles de-

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reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity").

[14] The court of appeals held that the evidence at trial in this case was sufficient to show that each petitioner "actively employed" a firearm within the meaning of *Bailey*. Pet. App. 71a-72a. None of the petitioners challenges that holding in this Court.

pends on whether machineguns or other enhanced weapons were "used," within the meaning of Section 924(c)(1) (as that term was construed in *Bailey*) by other members of the conspiracy. *Ibid.* The court of appeals correctly remanded the case to the district court to determine whether any such active use occurred. The court of appeals also directed the district court to consider on remand "whether [petitioners] actively employed [an enhancing] weapon during and in relation to the conspiracy to murder federal agents." *Ibid.*

Thus, petitioners' challenge to the application of the *Pinkerton* doctrine—like their other challenge to their sentences on Count 3—is not presently ripe for review. If the district court on remand applies *Pinkerton* in sentencing them, they will have an opportunity to challenge their sentences in the court of appeals and, if necessary, in this Court. If the district court concludes, however, that none of petitioners' co-conspirators actively employed machineguns or other enhanced weapons in furtherance of the conspiracy, the *Pinkerton* doctrine will be inapplicable to this case. Conversely, if the district court determines on remand that petitioners themselves used or carried machineguns or other firearms requiring an enhanced sentence under Section 924(c)(1), petitioners will be subject to enhanced 30-year sentences on that basis, irrespective of their co-conspirators' use of such weapons. In those events, questions concerning the proper scope and application of the *Pinkerton* doctrine would ultimately be irrelevant to petitioners' sentences. Review by this Court would therefore be premature at the present time.

4. Petitioner Whitecliff contends (96-1028 Pet. 9-12) that the district court erred in failing to instruct the jury that self-defense or the defense of others was a defense to the voluntary manslaughter charge. The court of appeals correctly rejected that contention, and it does not warrant further review.

a. In *United States* v. *Feola*, 420 U.S. 671, 679, 684 (1975), this Court noted that 18 U.S.C. 1114, which prohi-

bits the killing of federal officers, and its counterpart, 18 U.S.C. 111, which prohibits assaults on federal officers, were enacted to give "maximum protection to federal officers" and to create "the highest possible degree of certainty" that those who forcibly impede officers in the performance of their duties will be brought to justice. The absence of self-defense is not an element of the offenses under those federal statutes. Rather, self-defense is an affirmative defense on which the defendant bears the burden of production. If the defendant produces evidence in support of a claim of self-defense, the government bears the burden of persuasion and must prove the absence of self-defense beyond a reasonable doubt. *United States* v. *Alvarez*, 755 F.2d 830, 842-843 & n.12 (11th Cir.), cert. denied, 474 U.S. 905 (1985), 482 U.S. 908 (1987); *United States* v. *Johnson*, 542 F.2d 230, 232 n.4 (5th Cir. 1976).

"As a general proposition," this Court has explained, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). The court need not, however, instruct the jury regarding a defense that is so lacking in evidentiary support that no reasonable jury would accept it. See, *e.g.*, *United States* v. *Perez*, 86 F.3d 735, 736 (7th Cir. 1996); *United States* v. *Streit*, 962 F.2d 894, 898 (9th Cir.), cert. denied, 506 U.S. 962 (1992) (self-defense instruction not required); *United States* v. *Wagner*, 834 F.2d 1474, 1486 & n.12 (9th Cir. 1987) (same); *United States* v. *Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984) (same). Petitioner Whitecliff does not challenge the court of appeals' articulation (see Pet. App. 8a) of the governing legal standard; he simply asserts that the court misapplied that standard to the circumstances of the instant case. See 96-1028 Pet. 9-12. That fact-bound challenge does not warrant this Court's review.

b. In any event, the court of appeals correctly held that petitioners were not entitled to a jury instruction on self-defense with respect to the lesser-included offense of vol-

untary manslaughter because there was insufficient evidence at trial for a rational jury to have a reasonable doubt that petitioners were not acting in self-defense. Pet. App. 16a-30a. The government is not required to prove a defendant's knowledge of a federal officer's official identity as an element of the offense under Section 111 or 1114. See *United States* v. *Feola*, 420 U.S. at 684-686. A defendant may raise a claim of self-defense based on an "honest mistake of fact," however, if there is evidence to show that he did not know the official identity of the officers, he reasonably believed that the officers posed a threat of a hostile and imminent attack, and he used the same amount of reasonable force to defend himself against the officers as he would be justified in using against private citizens. See *United States* v. *Morton*, 999 F.2d 435, 437-438 (9th Cir. 1993); *United States* v. *Streit*, 962 F.2d at 898; *United States* v. *Alvarez*, 755 F.2d at 842-847; *United States* v. *Danehy*, 680 F.2d 1311, 1315 (11th Cir. 1982); *United States* v. *Ochoa*, 526 F.2d 1278, 1281-1282 (5th Cir. 1976); *United States* v. *Young*, 464 F.2d 160, 163 (5th Cir. 1972).

In the instant case, there was no evidence at trial from which a rational jury could have had a reasonable doubt that petitioner Whitecliff knew the official identity of the approaching ATF agents. The evidence showed that Koresh and the other Branch Davidians learned of the ATF's planned raid 45 minutes before the agents arrived. Pet. App. 3a, 16a-17a, 66a; Gov't C.A. Br. 12-13, 85-86. During that period, the Branch Davidians made preparations to repel the agents. Pet. App. 66a-67a; Gov't C.A. Br. 13-15. When they approached the compound, the agents clearly and repeatedly identified themselves as police officers. Pet. App. 17a; Gov't C.A. Br. 86. Moreover, most of the agents wore uniforms with vests that "had a large, gold ATF badge and the words 'ATF' and 'Police' inscribed in bright yellow, inch-high letters on their fronts," and "'ATF' and 'Police' were also emblazoned on the back of the vests in large, yellow letters visible at a distance." Pet. App. 18a; Gov't C.A. Br. 86. Based on that evidence,

the court of appeals correctly concluded that "a reasonable juror could not doubt that [petitioners] knew their targets were federal agents." Pet. App. 15a. See *United States* v. *Moore*, 958 F.2d 646, 649 (5th Cir. 1992); *United States* v. *Ochoa*, 526 F.2d at 1282; see also *United States* v. *Streit*, 962 F.2d at 898; *United States* v. *Alvarez*, 755 F.2d at 844-845 & n.15; *United States* v. *Jackson*, 726 F.2d at 1468.[15]

Nor is there merit in petitioner Whitecliff's claim (96-1028 Pet. 10-12) that he was entitled to a self-defense instruction because there was sufficient evidence to raise a reasonable doubt about whether the ATF agents used excessive force. A defendant who is aware of a government agent's official status may not use force to resist an arrest or the execution of a search warrant, even if the arrest is unlawful or the search warrant is defective. See *United States* v. *Span*, 970 F.2d 573, 579-580 (9th Cir. 1992), cert. denied, 507 U.S. 921 (1993); *United States* v. *Danehy*, 680 F.2d at 1315-1316; *United States* v. *Varkonyi*, 645 F.2d 453, 458-459 (5th Cir. 1981); *United States* v. *Johnson*, 542 F.2d at 233; *United States* v. *Johnson*, 462 F.2d 423, 427-428 (3d Cir. 1972), cert. denied, 410 U.S. 937 (1973); *United States* v. *Ferrone*, 438 F.2d 381, 390 (3d Cir.), cert. denied, 402 U.S. 1008 (1971). Such a defendant may raise a valid claim of self-defense, however, if he reasonably believed that the amount of force used by the officers in making an arrest or executing a warrant was "excessive," and if he used no more force than necessary to defend himself. See *United States* v. *Morton*, 999 F.2d at 438 n.2; *United States* v. *Span*, 970 F.2d at 577-578; *United States* v. *Streit*, 962 F.2d at 898-899; *United States* v. *Middleton*, 690 F.2d

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[15] The "lack of knowledge" defense is typically raised by a defendant's own testimony that he did not know the official status of his victim. See, *e.g.*, *United States* v. *Danehy*, 680 F.2d at 1313; *United States* v. *Ochoa*, 526 F.2d at 1280-1281; *United States* v. *Young*, 464 F.2d at 162 & n.4; see also *United States* v. *Jackson*, 726 F.2d at 1468. Petitioner Whitecliff did not testify at trial in this case, and he introduced no evidence suggesting that he did not know that the individuals attempting to enter the compound were law enforcement agents.

820, 826 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); W. LaFave & A. Scott, *Substantive Criminal Law* § 5.7(h), at 662 (1986 & 1997 Supp.).[16]

Petitioner Whitecliff relies (96-1028 Pet. 11) on the testimony of Kathryn Schroeder and Marjorie Thomas, two Branch Davidians who testified as government witnesses. Schroeder testified that, at the beginning of the raid, gunfire came into a room on the first floor of the building. Pet. App. 27a; Gov't C.A. Br. 31. Thomas testified that a gunshot came through the window into her room on the third floor shortly after she and her roommates saw helicopters approaching. Pet. App. 27a; Gov't C.A. Br. 32. Thomas also testified that she did not know whether the gunshot came from the helicopter. Pet. App. 28a. There was no evidence at trial, however, that petitioner Whitecliff was near either Schroeder's or Thomas's room at any time during the gun battle. There was also no evidence that ATF agents shot at petitioner Whitecliff before he shot at them. The court of appeals therefore properly concluded that no reasonable jury could infer that

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[16] The Fourth Amendment prohibits the use of excessive force by law enforcement officers even when the officers are performing their lawful duties. *Graham* v. *Connor*, 490 U.S. 386, 394-396 (1989); *Tennessee* v. *Garner*, 471 U.S. 1, 7 (1985). This Court made clear in *Graham* that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." 490 U.S. at 395. The Court noted that "Fourth Amendment jurisprudence has long recognized that the right to make an arrest * * * necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* at 396. The Court explained that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.* It also emphasized that the "reasonableness" standard "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

petitioner Whitecliff had acted in self-defense in response to excessive force used by the agents.

5. Petitioner Fatta challenges (96-7265 Pet. 6-12) his convictions on Count 9 for conspiring to possess machineguns and on Count 10 for possessing machineguns, in violation of 18 U.S.C. 371 and 922(*o*). Petitioner argues that Section 922(*o*), which prohibits the transfer or possession of a machinegun, exceeds Congress's power under the Commerce Clause and is therefore invalid. Petitioner primarily relies (96-7265 Pet. 8-12) on this Court's decision in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), which held that Congress exceeded its power under the Commerce Clause when it enacted the Gun-Free School Zones Act, 18 U.S.C. 922(q)(1).

The court of appeals affirmed petitioner Fatta's convictions on Counts 9 and 10 but held the mandate pending the decision of the en banc court in *United States* v. *Kirk*, 70 F.3d 791 (1995), reh'g en banc granted, 78 F.3d 160 (5th Cir. 1996). Pet. App. 7a, 98a. Subsequent to the court of appeals' decision in this case, an equally divided en banc court in *Kirk* affirmed the judgment of the lower court upholding the constitutionality of Section 922(*o*). See *United States* v. *Kirk*, 105 F.3d 997 (5th Cir. 1997). Thus, every court of appeals to consider the issue since this Court's decision in *Lopez* has held that Section 922(*o*) is a valid exercise of Congress's power under the Commerce Clause. See *United States* v. *Rybar*, 103 F.3d 273, 279-285 (3d Cir. 1996); *United States* v. *Kenney*, 91 F.3d 884, 889-891 (7th Cir. 1996); *United States* v. *Beuckelaere*, 91 F.3d 781, 782-787 (6th Cir. 1996); *United States* v. *Rambo*, 74 F.3d 948, 951-952 (9th Cir.), cert. denied, 117 S. Ct. 72 (1996); *United States* v. *Wilks*, 58 F.3d 1518, 1519-1522 (10th Cir. 1995). In the absence of a conflict among the courts of appeals, petitioner Fatta's contention does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

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